Hanlon & Wilson Company *and* Hanlon & Wilson Employees Union Local 711 *and* Mark E. Cole. Cases 6-CA-14055, 6-CA-14302, and 6-CA-14880

21 September 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 29 July 1982 Administrative Law Judge Karl H. Buschmann issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and Respondent and the General Counsel each filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge[3] and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Hanlon & Wilson Company, Jeanette, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Expunge from its files any references to the unlawful discharges of Donald Rugito, Charles Pershing, and Gregory Krivakuca and suspension of Mark Cole and notify them in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT threaten our employees with loss of jobs because of their union activities.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT suspend, discharge, or otherwise discriminate against employees in violation of the rights guaranteed them under the Act.

WE WILL NOT discourage membership in Hanlon & Wilson Employees Union Local 711, or any other labor organization, by discriminating against our employees in regard to their hire and tenure of employment or any other terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under the Act.

WE WILL offer to Donald Rugito, Charles Pershing, and Gregory Krivakuca reinstate-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge made certain inadvertent factual errors in his Decision, none of which affects our decision. He found that Krivakuca was absent from work 13 June 1980—the record shows he was absent 3 June; that Krivakuca received a suspension 19 September 1980 for unexcused absences—the record shows he received a notice of suspension on 14 November; that Krivakuca was suspended on 12 November—the record shows that he received a notice of this suspension on 21 November; and that Pershing was absent 23 December 1980—the record shows he was absent 23 September.

[3] In adopting the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(5) when it refused to provide the Union with the requested safety and medical records of the individual employees, we rely on the fact that the request was for individually identified safety and medical data. See: *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 31 (1982); *Johns-Manville Sales Corp.*, 252 NLRB 368, 368 (1980).

ment to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings or benefits, plus interest.

WE WILL make whole Mark Cole for loss of earnings and benefits, plus interest, he suffered because of the 3 days' suspension.

WE WILL expunge from our files any references to the unlawful discharges and suspension of our employees, Donald Rugito, Charles Pershing, Gregory Krivakuca, and Mark Cole, and notify them in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them.

HANLON & WILSON COMPANY

DECISION

KARL H. BUSCHMANN, Administrative Law Judge: Based on charges filed in Cases 6-CA-14055 and 6-CA-14302 by Hanlon & Wilson Employees Union Local 711, the General Counsel of the National Labor Relations Board issued a consolidated complaint on July 29, 1981. Additional charges were filed by Mark Cole, an individual, in Case 6-CA-14880. That case was consolidated with the prior complaint on October 9, 1981.

The complaint charged Hanlon & Wilson Company (Respondent) with violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). More specifically, the complaint alleges that Respondent had threatened its employees with discharge because of their union activities, had created the impression among its employees that their union activities were under surveillance, had maintained a discriminatory rule requiring inspection by Respondent of union materials, had suspended Mark Cole and Gregory Krivakuca, and discharged Robert Broker, Roger Cottrell, Gregory Krivakuca, Charles Pershing, and Donald Rugito because of union or concerted activities, had unlawfully refused to furnish the Union with Respondent's health and safety records and had refused to accept two grievances concerning Respondent's work rules. Respondent filed an answer on August 10, 1981, in which it admitted the jurisdictional elements of the complaint and denied the commission of any unfair labor practices. Respondent's answer also raised a number of affirmative defenses, including that the individuals who were suspended or discharged were disciplined pursuant to work rules regarding absenteeism and job performance, that the information requested by the Union was confidential, and that grievances were denied on the basis of timeliness.

A hearing was held before me on February 3, 4, 5, 11, and 12, 1982, in Pittsburgh, Pennsylvania.

The General Counsel and Respondent filed briefs on April 2, 1982.

Based on the entire record[1] in this case, including the briefs filed by counsel, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

Respondent Hanlon & Wilson Company is a Pennsylvania corporation, located in Jeanette, Pennsylvania, where it is engaged in the manufacture and sale of aircraft exhaust systems and related products. Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Hanlon & Wilson Employees Union Local 711, is admittedly a labor organization within the meaning of Section 2(5) of the Act. The approximately 40 production and maintenance employees of the Company are represented by the Union.

The parties have been operating under a collective-bargaining agreement which became effective on February 8, 1980, through February 7, 1983. All employees were provided with copies of the contract and a set of the Company's work rules. Rule 30, which deals with absenteeism, is of particular importance here. That rule has been in existence since 1966.

On September 8, 1980, Respondent's employees engaged in a wildcat strike which lasted until September 12. On that day when the employees had returned to work, the Company fired all the union officers. This action by the Company, however, is not the subject of this proceeding. Instead, it is Respondent's conduct in relation to the new union officers which is under scrutiny here against the following background.

On September 19, the Union informed the Company of the identities of the new union officers. They were: William Coyle, president; Donald Rugito, vice president; Gregory Krivakuca, secretary, and Brenda May, treasurer. The new union officers moved more aggressively in representing its membership than the prior ones. For example, immediately three grievances were filed which challenged the discharges of the prior union officers. The Union filed and processed three additional grievances, involving the suspension of certain employees. In contrast, the Union under its prior leadership had filed only two grievances.

At a meeting, on September 22, the Union voted to increase the monthly dues for its members from $2 to $16 a month. This caused an immediate and complicated dispute between the Union and the Company which did not want to change its existing practice under the checkoff provision in the bargaining agreement. The matter was finally settled by arbitration in which the grievance of the Company was sustained. In any case, the Company's active and persistent involvement with the issue certainly showed a less than cooperative attitude on its part toward the Union and its efforts in raising the monthly dues of its membership.

On October 17, the Union reported to Respondent that Robert Allen Broker and Mark Edward Cole had been appointed union safetymen and that Charles Allen Per-

[1] The General Counsel's motion to correct transcript is granted.

shing had become one of the Union's grievancemen. Pershing, however, made it clear at once that he did not want the appointment for fear that it might be "too much of a hassel." Broker and Cole, however, promptly met with management. At an orientation meeting, management told them their function was to go through the plant to make sure "things are safe, and to tell people to wear their safety glasses and things like that." At a second meeting, on October 31, both men reported to manangement several items as major safety hazards. Of particular concern were fumes and "a smell in the insulation area" which caused sickness and headaches among the employees. Respondent's general foreman, James Giannotti, responded to the safety complaints without serious concern, terming some of the complaints as ridiculous and stating: "We are not here to harass each other—we are here to help each other." Subsequently, Respondent increasingly received complaints from its employees about the fumes in the insulation and welding areas of the plant. Particularly outspoken about the fumes in the plant were Cole and Broker, the safetymen; Don Rugito, the Union's vice president; and employee Rodger D. Cottrell.

Against this background, Respondent is accused of having engaged in unfair labor practices, including independent violations of Section 8(a)(1) of the Act.

Violations of Section 8(a)(1) of the Act

Threats of loss of jobs. In November 1980, union safetyman Mark Cole had requested from James Giannotti, Respondent's general foreman, the safety and health records of all employees in the shop. Respondent referred to certain safety data already posted in the plant and generally denied the request for all employees' health records. It agreed only to provide Cole with his own records. On November 14, Carlyle Bollman, manager of manufacturing and an admitted supervisor, approached Cole at his work station. Bollman told Cole that he better not ask for safety records any more and if he "said anything else and asked any more about the safety records, that [he] could be out the door." Another supervisor, Jerry Storey, who had overheard that conversation told Cole: "you see, I told you you better quit pushing. He is mad now." Storey, in his testimony, explained that his remark was made for Cole's "own good."

In early January, at Bollman's behest, Storey told Cole to do "a Hatteas job" which requires a higher degree of skill than Cole's job experience. Storey told Cole that he better do a good job because they were going to get him. Upon completion of the Hatteas, Bollman inspected the work himself and considered it a satisfactory job. Storey then assigned Cole to cutting pipe plugs. Bollman again came by to inspect Cole's work and discovered that he had produced two scrap pieces. Although not considered an unusual occurrence for an employee to initially produce two practice pieces, Cole was criticized for it and promptly demoted to the labor pool. Supervisor Charles Derminer testified that there was a lot of talk about his demotion into the general force, and that he had told Cole at that time to be very careful because the Company would do anything they could to get rid of him.

Cole testified that similar statements were made by other supervisors, notably George Wolf in quality control and Art Frew in the inspection department. Cole's recollection in this respect appeared unclear and vague. I have therefore not credited that part of his testimony. However, the remarks made by Storey, Derminer, and Bollman, as summarized above, clearly show that Cole was repeatedly told that his job was in jeopardy because of his aggressive pursuit of safety complaints. These statements, even if made for Cole's own good, were coercive so as to constitute threats in violation of Section 8(a)(1) of the Act.

Creating the impression of surveillance. The complaint alleges that in February 1981, Supervisors Bollman and Gianotti created an impression among the employees that their union activities were under surveillance. In this regard, the record shows that both supervisors approached Cole and said: "We hear you are trying to get the steel workers in here . . . Don't try scaring us with the United Steel Workers coming in here."

Respondent contends that this evidence is insufficient as a matter of law to support a violation. However, statements made by supervisors, such as "we hear you are involved with the union," imply surveillance of the employees' union activities and have been held violative of Section 8(a)(1) of the Act, because such a "statement had a reasonable tendency to discourage the employees in exercising their statutory rights by creating the impression that he [management] had sources of information about their union activity." *Overnite Transportation Co.*, 254 NLRB 132, 133 (1981). I accordingly find that Respondent violated Section 8(a)(1) of the Act.

Discriminatory work rule. The complaint alleged that on February 13, 1981, Respondent verbally promulgated a discriminatory rule requiring Respondent's inspection of union materials of union officers while not requiring inspections of other items.

The record shows that Brenda May, the union treasurer, attempted to enter the plant on February 11, 1981, carrying a briefcase. A security guard prevented her from taking the briefcase into the plant, stating that he had received a note from Betty Barron. Barron was Respondent's personnel director, executive secretary, and office manager. On the following day, May attempted to enter the plant with folded papers in her hand. The guard stopped her again, requesting to know what the papers were. When she explained that they were personal papers, he let her go with the comment: "Just as long as they don't have anything to do with the Union." On February 12, the Company posted a notice addressed to all employees. This notice was a reminder of the work rules which required the inspection of lunchboxes and other items removed from the Company's premises.[2] On the next day, February 13, May succeeded entering the plant with the briefcase. However, at the end of the day, when she attempted to leave the plant, her supervisor, Phil Pyers, insisted on inspecting the briefcase before he gave her a pass.

[2] This document, received as G.C. Exh. 32, appears missing from the record.

During the same time, Supervisors Giannotti, Pyers, and Bollman told Cole that he could not take his briefcase out of the plant without first obtaining a pass. Cole explained that his briefcase was the "Union briefcase." Nevertheless, Pyers insisted that he had to search the briefcase to make sure that no one was stealing blueprints.

Since Respondent did not require passes of employees who wanted to leave the plant with lunchboxes or purses, the General Counsel submits that Respondent's requirement was unlawful.

Respondent justified its procedure, pointing to rule 13 of its work rules and discipline procedure which provides: "Removal of articles from Company property without written authorization—Discharge." Another notice which had been posted since 1973 provided as follows (Resp. Exh. 17):

> Effective today, and until further notice all employees taking material, bags, packages, etc., whether owned by the employee or the Company, must obtain a personal property pass from their Foreman.
>
> All such items will be checked by the Security Guards before passing through the employee's entrance, even with a personal property pass.
>
> Lunch boxes do not need a personal property pass, but each lunch box must be opened for inspection by the Security Guard. Clothes and personal items being removed from the Company premises must also be inspected and be accompanied by a personal property pass.
>
> There will be no exception to this rule. Failure to comply will result in disciplinary action.

The record shows that Respondent generally followed this notice and required passes for most items. Although lunchboxes did not require a pass, they were generally examined by security at least once a week even prior to the February 12 notice. The purses of female employees were not checked and generally did not require passes. That ladies' purses escaped scrutiny, however, and that lunchboxes were examined only periodically do not show that Respondent discriminated against the Union. The "Union briefcase" was not especially marked or otherwise identifiable as a union briefcase, so that Respondent's insistence on examining its contents did not appear to be an attempt to single it out. Moreover, the foreman, while inspecting the briefcase, did not read any of the material in it, but he only conducted a cursory examination of its contents. Under these circumstances, I cannot find that Respondent unlawfully discriminated in the maintenance or enforcement of the rule.

Violations of Section 8(a)(1) and (5) of the Act

The request for safety and health records. Respondent's refusal to furnish the Union with all the safety and health records of the employees is alleged as a violation of Section 8(a)(1) and (5) of the Act.

In November or December 1980, Mark Cole, the Union's safetyman, requested from the Company the safety records for all employees in the shop. He had initially contacted Supervisor Giannotti with his request and at different times also talked to Supervisors Bollman and Pyers. Specifically, Cole was interested in "any type of safety records that were required to be seen by OSHA regulations." Giannotti referred him to certain records posted on the bulletin board. In Coles' words, those were of a type which are sent to the Government once a year, which only states "the amount of people hurt in a certain year, the amount of injuries." These records were too general for Cole, because they did not show when and how the employees were hurt. Cole also refused to believe that those records posted in the bulletin board were required by OSHA regulations. Cole attempted to find out the number of accidents in certain areas of the shop, as well as the reason that people were getting sick near the area of the surface grinder machine. Nevertheless, Cole admitted that he did not explain the purpose of his request to any company official, and that he may inadvertently have asked for the employees' medical records. When Supervisor Pyers asked Cole why he needed those records, Cole responded that it was none of his busness, that he did not have to tell him, and that the Company had to show him the requested records. Respondent's position was that the information required by OSHA regulations were posted on the board in the shop, and that any other safety or medical records were contained in the employees' personnel records which may contain private and personal information, available only to the individual employee himself. Cole was permitted to inspect his own personnel file but not those of other employees. Other employees were permitted to request their personnel files and, at their discretion, supply the information to Cole.

It is well recognized that an employer's duty to bargain in good faith includes its duty to supply the Union with information so as to enable the Union to police the administration of an existing contract. Since the bargaining agreement in article 19, section 19.0, provided for satisfactory working conditions, including safety conditions, a request for safety records would fall within the category of information to which the Union is entitled. In the instant situation, Cole refused to indicate to the Employer the area of relevancy for the request. The Company only knew that Cole was the Union's safetyman. Since Respondent had already publicly disclosed certain safety data required by OSHA, and since the only additional safety or health information was contained in the employees' personnel files, it was not unreasonable for Respondent to take the position that such files could only be disclosed upon the request of the individual employee. Considering that Cole refused to inform the Employer of at least the general purpose of the health and safety records, and considering the confidential nature of the documents, as well as Respondent's partial compliance with the request, I find that Respondent did not violate Section 8(a)(5) of the Act.

Refusal to accept grievances. On November 7, 1980, Donald Rugito, union vice president and grievanceman, handed two grievances to Supervisor Giannotti: One of the grievances (G.C. Exh. 15) objected to the Company's work rules in their entirety as arbitrary and being beyond the rights of management. The other grievance

(G.C. Exh. 16) challenged one of the provisions of the work rules, dealing with tardiness, for having been promulgated without prior notice to the employees.

Respondent returned the grievances and refused to accept them, because they were filed untimely. Section 10.2 under article X of the agreement provides that: "A grievance must be initiated within thirty (30) days of its occurrences." Since the work rules had been in existence for several years and been reissued on February 8, 1980, the grievances were filed well beyond the 30-day time limitation. Accordingly, Respondent cannot be found to have violated the Act. *PPG Industries*, 245 NLRB 1290 (1979).

Violations of Section 8(a)(1) and (3) of the Act

The complaint has alleged as discriminatory the termination of six employees, Robert Broker on November 7, 1980; Roger Cottrell on November 7, 1980; Gregory Krivakuca on December 17, 1980; Charles Pershing on December 16, 1980; Donald Rugito on November 14, 1980; and Mark E. Cole on March 16, 1981. The latter's suspension on February 13, 1981, as well as the suspensions of Krivakuca on November 14 and 21, 1980, are also challenged as unlawful.

The General Counsel argues that the union activities by these individuals, in filing grievances and safety complaints, prompted Respondent's union animus. As a result, according to the General Counsel, Respondent resorted to an overly strict enforcement of its work rules, dealing with absenteeism, as a pretext, in order to rid itself of the employees. Respondent concedes that its attendance discipline in 1980 was more severe than in 1979, as part of an effort to "clamp down on all phases of the work rules" in order to improve profitability. But, according to Respondent, its policy was "applied in a fair, uniform and evenhanded manner by the Company." The only exception which the Company admittedly made involved William Coyle who had exceeded his allowable quota of absences. He was not discharged because he was 70 years old and, as the only tool-and-die maker, was kept on beyond the normal retirement age. Coyle was also the president of the Union.

The record shows that work rule 30 which deals with absenteeism has been in effect since 1966. It provides that after three unexcused absences an employee will be suspended for 3 days. Six unexcused absences in 1 year will result in 1 week off and, after nine unexcused absences an employee will be discharged (G.C. Exh. 3). An examination of the absenteeism record of the employees shows that the Company did not adhere strictly to this policy in 1979. The General Counsel has demonstrated that several employees exceeded the quotas and escaped the stated discipline. For example, employee R. Javens had 14 absences and incurred no discipline; employee B. May was not discharged even though she had accumulated nine unexcused absences. Similarly, Pershing who had accumulated more than nine unexcused absences was not fired in 1979. On the other hand, employee Kovac was disciplined and ultimately discharged for violating rule 30. Other employees who had exceeded their quota of unexcused absences were suspended in accordance with the stated discipline.

In 1980, after Respondent had vowed to enforce its rules more strictly, 7 of its 40 employees were discharged because they had exceeded the limit in unexcused absences (Resp. Exh. 19). Five of these discharges are challenged as discriminatory. The discharges occurred after the employees had exceeded nine unexcused absences. Broker had 12 unexcused absences, Cottrell had accumulated 10, Krivakuca 13, Pershing 13, and Rugito 9. Pershing who was not involved in the Union was included as a discriminatee because, according to the General Counsel, Respondent attempted to conceal its discriminatory motivation for the other four because of their protected activities. In sum, considering that Respondent discharged seven employees all of whom had exceeded their quota of unexcused absences, that the only employee who was not fired after he had exceeded that limit was the Union's president, that five discharges are challenged as improperly motivated even though one of the five had not engaged in any protected activity, it superficially appears that Respondent's conduct was fairly consistent. Moreover, a broad assessment of Respondent's enforcement of rule 30 in 1980 compared to 1979 indicates a stricter but also a more uniform approach.

The General Counsel however, points to the Union's "newly adopted aggressiveness" in filing grievances and safety complaints and Respondent's resulting hostility, as evidenced by repeated threats and other independent 8(a)(1) violations, as well as Respondent's decision in 1980 to strictly enforce the work rules, and argues that the discharges were unlawful.

Robert A. Broker had been employed as a sawman from October 1979 to November 7, 1980, when he was discharged. In November 1980, he became one of the two safetymen for the Union. In his capacity, Broker attended two meetings with representatives of the Company. During the first meeting, Giannotti told them what their positions as a safetyman meant, and that they were to go through the plant, make sure things are safe, and tell "people to wear safety glasses and things like that." During the second meeting on October 31, 1980, he and the other safetyman reported to the Company what they perceived were serious safety violations, as for example suggesting that the glass in welders' masks was unsafe and that it ought to be made out of plastic. The subject of adequate ventilation was also brought up, because Broker had received complaints about fumes in the insulation and welding areas. In response to their report of safety violations Giannotti commended that these complaints were ridiculous and that they were not to harass, but help each other. Broker became subsequently more involved in voicing complaints about the fumes in the shop. Broker had received complaints from employees Roger Cottrell and Bob Klassen that they were getting ill from the fumes. On November 7, before noon, Broker told Giannotti that the situation in the insulation areas was getting worse and hazardous to the health of the employees. Broker requested that the ventilation fan be turned on. Giannotti refused. At that point during the conversation, William Coyle and Donald Rugito joined the conversation, also urging that the fan be turned on.

Giannotti remained adamant and continued to refuse the request, Rugito finally said that if Giannotti would not turn on the fans, they would have no choice but "to have to step over his head to get them turned on." During the afternoon of the same day, at 3:25 p.m. Giannotti handed Broker a termination notice.

The record shows that Broker had indeed exceeded his quota of nine absences and that he had received prior suspensions for his absenteeism. However, the suddenness of the discharge which followed the confrontation with Giannotti could lead to an inference that Respondent's reasons were pretextual. This is particularly so since Roger Cottell who was also part of the November 7 incident was fired on the same day under similar circumstances. Such an inference, however, is unwarranted, since the discharge notice was prepared prior to the incident. The notice is dated November 6, and there is testimony that it was indeed typed on that date. Indeed, the General Counsel does not dispute that date. As a consequence, Broker's union involvement prior to management's decision to terminate his employment was relatively inconspicuous. It consisted of two prior safety meetings in which he did not appear as the principal spokesman and several appeals to management to have the ventilation fans turned on. On the basis of the foregoing, I cannot find any unlawful discrimination.

Roger Cottrell had been employed by Respondent since June 26, 1979, initially as a laborer. He was subsequently promoted to insulation man. He was discharged on November 7, 1980, ostensibly because of his absenteeism record. Cottell was a member of the Union but did not hold any union office. Beginning with the week of November 3, 1980, he complained to management about noxious fumes coming from the surface grinder near his working area in the insulation department. The circumstances surrounding this controversy are best described in Cottrell's own words (Tr. 145):

> Well, the surface grinder was not run all the time, but starting this week they—well, they shut the windows and it was getting chilly at that time of the year. And there was a fan rotated right above us and I used this fan for ventilation from the surface grinder, from the fumes. And the foreman, Giannotti, come back and kept turning off the fan. And when the fan was shut off, the fumes accumulated. And I had complaints from people that worked with me, and I was getting sick and headaches and some were getting nauseated. And I kept turning it on and he kept saying the people were getting cold in the front of the shop. And I kept going back and forth. I would turn it on and he would shut it off.

On November 4 and 5, Cottrell also complained to Union Vice President Rugito and President Bill Coyle. They in turn informed management. For several days the employees themselves turned on the ventilation system which management repeatedly turned off, until November 6, when Respondent placed a padlock on the fan, permanently shutting it off. Cottrell then complained to union safetymen, Broker and Cole, who on November 7, confronted Giannotti about the ventilation problem. They were joined by Rugito and Coyle. The complaints remained fruitless, the fan was never turned on again. Cole then spoke to Cottrell about filing an OSHA complaint. In the meantime, Cottrell had gotten ill from the fumes and was getting a pass for sick leave from Supervisor Phil Pyers. While Pyers was signing the pass, Giannotti approached Cottrell and gave him a termination slip for excessive absenteeism with the comment that he (Cottrell) had brought this all on himself.

Again, the termination notice, although handed to Cottrell on November 7, following the confrontation on his behalf between Giannotti and the four union men, was dated November 6, 1980, and, according to uncontroverted testimony, also prepared on that day. An inference of union animus based on the timing of the notice is, therefore, not permissible. Moreover, Giannotti's comment that Cottrell had brought all this on himself is ambiguous. A reasonable interpretation would include that Cottell could have avoided the Company's action if he had reported for work more regularly. Considering that Cottrell had incurred nine unexcused absences which under the Company's work rules entail an employee's discharge, I do not find any unlawful discrimination.

Donald Rugito had been employed by the Company as a tool-and-die maker since March 16, 1979. On December 13, 1979, he was discharged due to excessive absenteeism. However, after he agreed to seek medical help and go on sick leave, he was reinstated effective January 15, 1980. He had been diagnosed as suffering from severe allergies which made him susceptible to respiratory infections and other illnesses. He assured the Company, however, that his work record would improve, and that he would be undergoing certain treatment for his medical condition. By April 1980, he had incurred three unexcused absences and was suspended for 13 days. As of June he had accumulated six absences and was suspended again. On November 14, he was discharged for excessive absenteeism after nine absences.

With particular emphasis, the General Counsel points to Rugito's aggressive union activity and Respondent's refusal to accept two statements by his physician, and argues that Rugito's absenteeism was a pretext for his discharge.

On September 18, 1980, Rugito became active in the Union as its vice president. But by that time he had already been disciplined twice for his unexcused absences. In addition to his normal functions as a union vice president, Rugito was actively involved in the fumes controversy between October 31 and November 7, 1980. Acting on the complaints of employees Roger Cottrell and John Martin, Rugito examined the lack of ventilation in the affected areas of the shop and reported it to Supervisor Carlyle Bollman. Bollman's reaction was that the ventilation fan in the insulation area would cause a draft in the rest of the plant, and that it "was better for four guys to be sick than the whole plant sick from the cold." Rugito also complained to Supervisor Pyers on November 5. Pyers, however, became upset when he saw Rugito near the insulation area talking to Supervisor Derminer, who himself had gotten sick from the fumes.

Pyers stated that OSHA had inspected the plant and given it "a clean bill of health." Because management had locked the ventilation fans, Broker and Cottrell confronted Giannotti on November 7. Rugito and Coyle subsequently joined that conversation in which Rugito made his comment that he would have to go over Giannotti's head to get the fan turned on. Rugito then turned to Bollman again with his complaints. Bollman finally agreed to get masks for the employees.

Following the discharges of Broker and Cottrell in the afternoon of November 7, Rugito filed a grievance on their behalf on November 12, 1980. On November 14 a hearing was held in Giannotti's office over the two discharges. Appearing on behalf of the Union were Coyle, Krivakuca, and Rugito, the latter acting as the spokesman. The Company was represented by Giannotti, Barron, and Bollman. During the discussion it was agreed that Broker and Cottrell would be permitted to submit excuses for their unexcused absences. At the conclusion of the meeting, Giannotti handed a 3-day suspension notice to Krivakuca and a termination slip to Rugito. Rugito immediately challenged two of the unexcused absences on July 8 and 14 and vowed to bring a physician's statement for those dates. On the following working day, Rugito brought in a physician's statement, dated November 14, 1980, which, however, indicated that Rugito was treated on July 9 and 15. At Rugito's discharge hearing, the Company took the position that the physician's statement was untimely and that it indicated dates different from those for which he was discharged. Even though Rugito explained that he had been too ill to visit a doctor on July 8 and 14, and that the Company could verify that with the physician, the Company refused to change its position.

On November 25, Rugito attempted to participate in a meeting between the Union and the Company, stating that since he was still the Union's vice president he had a right to be there. Bollman and Giannotti ordered him to leave the premises, stating that as a fired employee he had no more business with the Union. Giannotti then said that Rugito had failed to cooperate and that "everything that [he] had done had been bad for the Company."

This comment leaves little doubt that Respondent regarded Rugito as a liability, and obviously wanted to discharge him. Respondent would not have shown any disparate treatment in discharging him based on a fair application of rule 30, particularly when it is considered that he should have been concerned about any unexcused absences following his discharge in 1979 for excessive absenteeism. However, Respondent dismissed his doctor's excuse as untimely and invalid. Yet Respondent had no formal policy regarding the timeliness for offering written excuses. Indeed, Respondent's informal policy—which it intended to change in 1981—actually permitted untimely excuses. During the discharge hearing, Respondent had just agreed to accept excuses for Broker and Cottrell which would equally have been untimely. Moreover, when Rugito told Bollman and Giannotti during the meeting on November 14, that he had excuses for the 2 days in July, they may not have committed themselves to accept them, but they certainly did not indicate then that an excuse for those days would be untimely. With respect to Respondent's claim that the dates on the physician's statement "were not the dates that he was absent" (Resp. Br. 21), the slip does specify dates which follow by 1 day the days on which he was absent, a technicality which it waived in the case of employee Jeff Speicher (G.C. Exh. 39). If there were any doubt about the exact dates, Respondent could also have contacted Rugito's physician as he suggested. Accordingly, considering Respondent's animus, particularly that directed against Rugito, as well as the disparate treatment in rejecting his doctor's excuses, I find that Respondent violated Section 8(a)(1) and (3) of the Act in discharging him.

Charles Pershing was a welder in Respondent's employ since March 21, 1977. He was discharged on December 16, 1980, because of excessive absenteeism. Pershing was only remotely connected with the Union. Sometime in October he had accepted the position as a safetyman. However, Pershing never functioned in that capacity, because a few days later he informed Rugito and Supervisor Giannotti that he did not want that position since "it was too much hassle." Pershing was a member of the Union but considered himself a passive member. Nevertheless, the General Counsel argues that Respondent discharged Pershing to legitimate its discharges of union activists.

The record shows that Pershing was suspended in due course as discipline for several unexcused absences. Even though he had accumulated 12 unexcused absences, he was however, not discharged until December 16, 1980. And that happened only after a Board agent had asked Supervisor Barron on December 11, about Pershing's absenteeism record. Giannotti handed the notice to Pershing with the comment: "I hate to see this happen to you, but there is nothing I can do about it. It is the way the Company wants it." Pershing then told Giannotti that the December 23 absence, which appeared on the slip as unexcused should have been excused, because on that day he, his wife, and son had gone to Children's Hospital in Pittsburgh for test in connection with his son's thyroid problem. Pershing recalled that he had obtained advanced approval for that trip, and that Giannotti had indicated that a written excuse was unnecessary for that date. In any case, on December 16, he did obtain a statement dated December 16, 1980, from the Hospital confirming the hospital visit. He handed it to Giannotti on the following day. But a few days later, Respondent informed Pershing that the notice had been submitted too late.

On the basis of the foregoing, as well as Respondent's union animus, I find that Respondent's rejection of Pershing's written excuse is suspect and amounted to disparate treatment in an effort to justify its earlier refusal to accept the written excuse from Rugito. As stated earlier, the Company had never rejected a written excuse as untimely; to the contrary, its policy had been to accept written excuses after the fact. Moreover, at no time did management tell him that it would be a waste of his time to obtain the excuse. But for Respondent's effort to be consistent with its discriminatory treatment of Rugito,

Pershing would have been permitted to justify his absence with the statement from the hospital. Respondent based the termination of Pershing on his absence on that date. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act in discharging Pershing.

Gregory Krivakuca was discharged on December 17, 1980, following a relatively short career as the Company's molder. He had started working for Respondent on April 11, 1980. Following five consecutive absences in May 1980, he was discharged. He was reinstated on May 13, with the understanding that the Company expected an improvement in his attendance record. On September 19 he received a suspension for unexcused absences on July 13, and September 12. His supervisor, Bollman, was aware of Krivakuca's problem as a single parent and exhibited understanding and leniency in accepting excuses. However, Respondent kept him fully advised of its concern about his attendance. On November 12 he was disciplined with a 5-day suspension because of unexcused absences on September 18, October 30, and November 6. His discharge notice, dated December 4, showed unexcused absences for November 7, 10, and 11.

The General Counsel alleges unlawful discrimination because Krivakuca had not missed any days of work between receiving his first disciplinary notice which required improvement in his attendance record and his final discharge notice, and because Respondent refused a written excuse for November 7, 10, and 11, 1980.

The record shows that Krivakuca was a union activist who served as the Union's secretary. He participated at the November 14 discharge hearing over the termination of Cottrell and Broker. He and Coyle approached Respondent on November 21, in an effort to obtain Respondent's cooperation for the new dues-checkoff authorization. And at a meeting on December 16, involving the discharge of Pershing, Krivakuca requested from Giannotti a list of the addresses and telephone numbers for all union members. Giannotti denied the request, stating that it called for private information. Nevertheless, Krivakuca insisted that as union secretary he needed the list for mailing purposes. Giannotti remained adamant, but agreed to Krivakuca's request to post a union notice calling for a membership meeting on December 17, 1980. Following the meeting, during which Krivakuca was able to complete his membership list, Giannotti handed him his discharge notice.

Krivakuca immediately challenged his discharge on the grounds that he had not missed any working days between the time he received his first suspension slip and his final notice and, futher, because he had already submitted excuses for his absence on November 7, 10, and 11, which showed that Krivakuca's son had needed emergency room care at the Westmoreland Hospital (G.C. Exh. 29). Respondent, however, rejected these statements on the ground that they may have been valid excuses for Krivakuca's son but not for the employee himself, especially because he had already been advised that the Company "could not handle any more baby-sitting problems" (Br. 30).[3]

Respondent was unable to explain that a time lag naturally occurred when disciplinary slips were issued, but, more importantly, that suspensions in Krivakuca's case were specifically timed so as to interfere as little as possible in the backlog condition in the foundry. Krivakuca was accordingly given little time in showing an improvement in his attendance as of the date of his first suspension; however, he was on constant notice that his attendance record was among the poorest in the plant and that Respondent was very concerned about it. I, accordingly, find that in this respect Respondent did not discriminate in applying rule 30 of its work rules, and in suspending this employee.

However, Respondent's rejection of the written excuses for his absence of November 7, 10, and 11, appears to be discriminatory. Respondent was aware of Krivakuca's status as a single parent and tolerated his repeated absences due to "baby sitting" problems. Respondent's patience in this regard may have been wearing thin at that point. However, there is a great deal of difference between a babysitting problem on one hand, and the emergency treatment of a severely ill child on the other. Indeed, Respondent had tolerated absences of other employees who accompanied someone else for medical care. I can attribute Respondent's change in its attitude, as well as its sudden hard-hearted attitude, towards this employee only to Krivakuca's protected activities. Respondent discriminated against this employee when it rejected his excuses for the 3 days in November and considered them to be unexcused absences. Since Respondent relied on these absences in the application for rule 30 and in discharging Krivakuca, I, therefore, find that Respondent violated Section 8(a)(1) and (3) of the Act.

Mark Cole was first hired as a laborer on April 28, 1980. He subsequently was moved to the machine shop as a trainee. On October 17, Cole was appointed one of two union safetymen, and in December he became vice president of the Union. On March 17, 1981, he was discharged with the following notice (Resp. Exh. 32):

> Because of the medical opinion given by the doctor concerning your history of allergic reaction to cutting oil and trchlorethylen and because there is no production position in the company which does not involve exposure to these agents we are hereby terminating you for you [sic] own health and safety you are being removed from employment role as of today.

Not only has the General Counsel charged that Cole was unlawfully discharged but also that he was suspended for 3 days on February 23, 1981, because of his protected activities.

The record shows that Cole was a union activist who participated frequently and aggressively in several areas of union activities. As safetymen, he and Broker, met with Giannotti on October 31 to call to Respondent's attention several safety hazards, including the fumes in the insulation area. Giannotti considered those complaints ri-

[3] At the hearing, Respondent demanded from witness Krivakuca additional documents which would reflect the days of treatment for his son. They were produced and substantiated the prior documents (G.C. Exhs. 41, and 42).

diculous and felt harassed by them. On November 7, Cole and Broker complained to management again about the fumes, first to Giannotti and then to Bollman. Cole went so far as to file a complaint with OSHA. He also requested the safety and health records from the Company sometime in November. Because of his persistence in this regard, several supervisors warned him that he might jeopardize his job. For example, Bollman told him on November 14, that he might be "out the door" if he persisted. Storey advised that he better quit pushing, since Giannotti was angry. In January 1981, Bollman had Cole set up a "hatteas job" to see whether Cole was sufficiently skilled. When Cole performed that task satisfactorily, he was told to cut pipe plugs. Because he produced some scrap, he was temporarily demoted to the labor pool. During that episode, Supervisors Storey and Derminer cautioned Cole to be careful because the Company wanted to get rid of him. Then there was the conversation in February 1981 where Bollman and Giannotti questioned him about the Steelworkers. They said that they heard that he was trying to bring in the United Steelworkers. Of significance was also Cole's refusal to get a pass for his "Union briefcase" sometime in the middle of February. In sum, the record is replete with incidents of Cole's protected activity, some of which Respondent obviously resented. Although the issue is close, I find that Cole's discharge was not the result of his protected union activity.

As early as August 1980, Cole experienced serious allergic reactions to certain oils used in the machine shop. As a result he was unable to work for more than a month. The substance which was used in the machine shop to clean machines was trichloroethylene and cutting oil. After an exposure to the substance for 1 hour or more, he developed a rash. He was hospitalized for 5 days and treated with respiratory therapy. His medical bills paid by Respondent exceeded $1,300 and he returned to work 5-1/2 weeks later. He was also treated by a personal physician who advised him that he was allergic to the substance known as trichloroethylene.

In early March 1981, while working as a laborer on a job called "back spot facing," Cole came into contact with machine oil. He developed an immediate reaction to the oil. In Cole's own words, "[m]y arm started getting itchy and I noticed a rash developing. And I previously received a rash while I was working there. And I didn't want to get that rash back again." Cole promptly left work to get a shot and returned for work on the following day, March 11. At that time, the Company requested that Cole see Dr. Blatchley, a dermatologist. He examined Cole's reaction to three substances, cutting oil, coolant, and trichloroethylene. He found that Cole was allergic to cutting oil and the trichloroethylene (Resp. Exh. 30). The physician advised Cole that he should wear gloves, but recommended against working there. Cole returned 2 days later to the plant and asked his supervisors whether he "could work with gloves, if there was any job that [he] could do—actually [he] told them that [he] could be a mailboy." Mrs. Barron responded and said that the Company would contact him later. On the following day, March 17, Barron called Cole, and informed him of the contents of Dr. Blatchley's report to the Company. She then told him that he had a choice of quitting the job or being terminated because there were no jobs in the plant where he would not be exposed to cutting oil or trichloroethylene. Cole said he did not want to quit but preferred a layoff. Barron rejected a layoff but mentioned that he would collect unemployment compensation if he were terminated. Cole refused a voluntary discharge and was discharged by telegram (Resp. Exh. 32). Subsequently, Respondent hired a new employee as a sawman and two new employees as inspectors. Cole, however, admitted that he had never worked as a sawman and that an inspector's job would come into contact—although rarely—with the substances to which he was allergic.

From the foregoing, it is clear that Cole did not wish to and could not continue in the same job. Moreover, the record shows that these substances were present to some degree throughout the plant so that Cole's allergy might have reappeared even if he had been assigned to a different job within the shop. Under these circumstances, it does not appear unreasonable for Respondent to have terminated his employment. Accordingly, I conclude that Respondent did not terminate Cole's employment because of his union and protected activities.

Cole's suspension occurred on February 13, when Cole was notified that he was suspended for 3 days because he left work on January 30 and February 2 and 6, 1981. Cole served the suspension from March 3 to 5, 1981. Cole testified, however, that he had obtained advance approval and that he had informed Supervisors Giannotti and Pyers that he was leaving early on those days because of union business. On these occasions his supervisors reluctantly permitted him to leave early. Cole's testimony was not contradicted by Giannotti or Pyers.

This evidence clearly shows that Respondent suspended Cole because of his protected activities, and that the Company violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with loss of jobs, Respondent violated Section 8(a)(1) of the Act.

4. By creating the impression of surveillance, Respondent violated Section 8(a)(1) of the Act.

5. By discharging Donald Rugito, Charles Pershing, and Gregory Krivakuca, on the basis of absences for which it had rejected valid excuses, Respondent showed disparate treatment. Respondent discriminated against these individuals because of their protected activities. It, therefore, violated Section 8(a)(3) and (1) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

6. By suspending Mark E. Cole for 3 days, March 3 to 5, 1981, because he had engaged in protected activities, Respondent violated Section 8(a)(3) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

All other allegations in the complaint have not been substantiated.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Accordingly, Respondent shall be ordered to offer immediate and full reinstatement to Donald Rugito, Charles Pershing, and Gregory Krivakuca to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority and other rights and privileges and to make them whole for any loss of earnings they may have suffered as a result of the discrimination against them. Respondent will also be ordered to make whole Mark Cole for any loss of earnings and benefits he may have suffered as a result of the 3-day suspension from March 3 to 5, 1981. Backpay shall be computed in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[4]

ORDER[5]

The Respondent, Hanlon & Wilson Company, Jeannette, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with the loss of jobs because of their union activities.

(b) Creating the impression among its employees that their union activities were under surveillance.

(c) Discouraging activities in the Hanlon & Wilson Employees Union Local 711, or any other labor organization by discharging or in any other manner discriminating against employees in regard to their hire or tenure of employment or any other term or condition of employment.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policy of the Act:

(a) Offer Donald Rugito, Charles Pershing, and Gregory Krivakuca immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, and make them whole for any loss of pay and other benefits in the manner set forth in the section entitled "The Remedy."

(b) Make whole Mark Cole for any loss of pay and other benefits he suffered as a result of the suspension on March 3 through 5, 1981.

(c) Post at its Jeannette, Pennsylvania, facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

[4] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."